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Attorney for Use Plaintiff, Bering Industrial Contractors, Inc.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA, for the use
and benefit of BERING INDUSTRIAL
CONTRACTORS, INC., a Washington
corporation,

Plaintiff,

v.

WESTERN SURETY COMPANY, a South
Dakota corporation,

and

AMERICAN CIVIL CONSTRUCTORS
WEST COAST, INC., a California
corporation,

Defendants

Case No.

MILLER ACT COMPLAINT

COMES NOW Use-Plaintiff, the United States of America, for the use and benefit of Bering Industrial Contractors, Inc., and alleges as follows:

PARTIES

1. The Use-Plaintiff, Bering Industrial Contractors, Inc. ("Bering") was and is a Washington corporation licensed, bonded and registered to do business as a contractor in the State of Washington. Bering has paid all necessary fees and penalties due and is otherwise qualified to maintain this action. Bering is a registered contractor in the State of Alaska (license number 33259),

1 and its license was in effect at all relevant times. Bering has performed all conditions precedent
2 necessary to maintain this action.

3 2. Upon information and belief, Defendant Western Surety Company (“Western”) is a
4 South Dakota corporation engaged in the compensated surety business.

5 3. Defendant American Civil Constructors West Coast, Inc. (“ACC”) is a California
6 corporation performing work in the State of Alaska.

7 **JURISDICTION**

8 4. Pursuant to 28 U.S.C. § 1331, the Court possesses federal question jurisdiction under
9 the “Miller Act,” 40 U.S.C. §§ 3131-3134, over Bering’s cause of action against Western.

10 5. Pursuant to 28 U.S.C. § 1367, the Court has Supplemental Jurisdiction over Bering’s
11 causes of action against ACC.

12 **VENUE**

13 6. Venue is proper in this Court under 40 U.S.C. § 3133(b)(3)(B) and 28 U.S.C.
14 § 1391(b)(2) because the work out of which this dispute arises was performed in Kodiak, Alaska.

15 **FACTUAL ALLEGATIONS**

16 7. This dispute arises out of a federal government construction project commonly known
17 as “United States Coast Guard Integrated Support Command Kodiak, Alaska Fuel Pier Project”
18 (“Fuel Pier Repairs Project”), which ACC performed under Contract No. HSCG50-08-C-643-F75
19 (“Prime Contract”).

20 8. On or about April 11, 2008, ACC contracted with the Department of Homeland
21 Security, United States Coast Guard to perform the Fuel Pier Repairs Project.

22 9. On or about May 15, 2008, ACC subcontracted with Bering to perform the
23 mechanical and fuel piping work portion of the Fuel Pier Repairs Project (“Subcontract”).

24 10. Western furnished to the United States of America a joint and several payment bond
25 dated April 14, 2008 in the penal sum of \$6,945,900 (“Payment Bond”) conditioned upon the timely
26 and proper payment to all persons supplying labor and material in the prosecution of the Fuel Pier
27 Repairs Project.

1 11. The Subcontract contained a Preliminary Schedule, which ACC subsequently
2 replaced with a permanent CPM schedule, showing a completion date of on or about October 1,
3 2008, for all work on the Fuel Pier Repairs Project. Bering mobilized and prepared its work efforts
4 based on the original completion date of on or about October 1, 2008.

5 12. Through no fault of its own, Bering was unable to meet the completion date of on or
6 about October 1, 2008. Structural steel installation, which was essential to completion of Bering's
7 work, but which was not in Bering's Subcontract, was not installed consistently or in accordance
8 with the permanent CPM schedule. Other schedule delays for which Bering was not responsible also
9 delayed Bering's work, pushing the work into harsh winter months and subsequently into another
10 construction season.

11 13. As a result of the aforementioned schedule delays, Bering's work was delayed and
12 disrupted causing Bering to incur additional unanticipated costs in an amount not less than the
13 principal sum of \$268,147.00.

14 14. Bering has submitted a claim to ACC and to Western (under the Bond) but ACC and
15 Western have failed to pay Bering any amounts under that claim.

16 **FIRST CLAIM FOR RELIEF**

17 (BREACH OF CONTRACT)

18 15. Bering repeats and realleges paragraphs 1 through 14 above as though set forth in full
19 herein.

20 16. Bering has performed all of its obligations under the Subcontract.

21 17. ACC has breached the Subcontract in that it has failed and refused to pay Bering in
22 full for labor, services and materials furnished in the prosecution of the work provided for in the
23 Prime Contract and pursuant to the Subcontract.

24 18. Bering has suffered damages as a direct and proximate result of ACC's breach of
25 contract.

1 **SECOND CLAIM FOR RELIEF**

2 (QUANTUM MERUIT)

3 19. Bering repeats and realleges paragraphs 1 through 18 above as though set forth in full
4 herein.

5 20. Bering provided valuable labor, services and materials that were necessary for ACC
6 to perform and complete its obligations under the terms of the Prime Contract.

7 21. ACC benefited from Bering's labor, services and materials, including but not limited
8 to the fact that ACC could not have fully performed and completed its obligations under the terms of
9 the Prime Contract in the absence of the labor, services and materials that Bering provided.

10 22. ACC has failed and refused to pay Bering for the labor, services and materials
11 referenced herein.

12 23. Bering has suffered damages and ACC has been unjustly enriched as a result of
13 ACC's failure to pay Bering for the labor, materials and services provided by Plaintiff.

14 **THIRD CLAIM FOR RELIEF**

15 (MILLER ACT PAYMENT BOND)

16 24. Bering repeats and realleges paragraphs 1 through 23 above as though set forth in full
17 herein. More than ninety (90) days, but less than one year, has expired from the last date upon which
18 Bering furnished labor and materials on the Fuel Pier Repairs Project.

19 25. Pursuant to the Payment Bond, Western is obligated to pay Bering for the labor,
20 materials and services Bering furnished in the prosecution of the work provided for in the Prime
21 Contract, and for which ACC has failed to make payment.

22 26. Western has failed to fulfill its obligation under the Payment Bond to pay Bering for
23 labor, materials and services furnished in the prosecution of the work provided for in the Prime
24 Contract, and for which ACC failed to make payment.

25 27. Bering is entitled to payment from Western pursuant to the Miller Act, 40 U.S.C.
26 § 3133.

PRAYER FOR RELIEF

WHEREFORE, Bering prays for the following relief:

1. Damages in an amount not less then the principal sum of \$268,147.00;
2. For an award of interest as allowed by law;
3. Cost of suit incurred herein;
4. Reasonable attorneys' fees; and
5. Such other and further relief as the Court may deem just and proper.

DATED this 19th day of August, 2009.

LAW OFFICES OF JOHN LUKJANOWICZ, PC

By: /s/ John Lukjanowicz

John Lukjanowicz, ABA 9411133
Attorneys for Plaintiff United States for the Use
and Benefit of Bering Industrial Contractors, Inc.
and Bering Industrial Contractors, Inc.